SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

No. [redacted] 132

STEPHEN HARVEY MILLANG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. _____

STEPHEN HARVEY MILLANG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Stephen Harvey Millang respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 3, 1970.

OPINION BELOW

The opinion of the court below is not yet reported, and appears as Appendix "A" herein. No written opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment and opinion of the court below was entered on March 3, 1970, affirming petitioner's conviction in the United States District Court for the Central District of California for violating 50 U.S.C. App., §462. A timely Petition for Rehearing was denied on March 23, 1970 and this Petition for Certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Selective Service Regulation 32 C.F.R., §1625.2, insofar as it places limitations on a registrant's valid, post-induction order claim of conscientious objection is void because it is not authorized by the Military Selective Service Act of 1967 and is contrary to the provisions of 50 U.S.C. App., §456(j).

2. Whether the Military Selective Service Act of 1967 and Selective Service Regulation 32 C.F.R., §1625.2, construed and applied to foreclose a local draft board from considering a registrant's valid claim of conscientious objection to war, because the objection crystallized after the board ordered the registrant to report for induction, infringes upon freedom of religion and violates due process and equal protection of the law contrary to the guarantees of the First and Fifth Amendments to the Constitution.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, First Amendment, Freedom of Religion Clause:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

United States Constitution, Fifth Amendment, Due Process Clause:

> " . . . nor shall any person . . . be deprived of his life, liberty or property, without due process of law. . . ."

50 U.S.C. App. §456(j) [Conscientious Objectors]:

> "(j) Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Selective Service Regulations, 32 C.F.R., §1625.2:

> "The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Department of Defense Directive No. 1300.6:

> "Federal courts have held that a claim to exemption from military service under the UMTF Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after

entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained."

STATEMENT OF THE CASE

Petitioner, a Selective Service registrant, was classified I-A by his local draft board, and on July 10, 1967, was ordered by his board to report for induction on July 25, 1967. On July 13, and again on July 18, 1967, petitioner's local board received requests from petitioner for the special form for conscientious objectors (sometimes referred to as Form 150). The form was mailed to petitioner, who completed it and filed it with the board on July 20, 1967, stating on the form based upon his religious training and belief that he was conscientiously opposed to participation in war in any form. The local board twice refused to reopen petitioner's case. The board renewed petitioner's order to report for induction, and petitioner refused to submit to induction.

Petitioner was indicted in the District Court for the Central District of California for refusing to submit to induction in violation of

50 U.S.C. App. §462. He was tried by the court, found guilty and sentenced to three years imprisonment.

The court below affirmed petitioner's conviction in light of its recent in banc decision in Ehlert v. United States, ___ F. 2d ___, No. 21930, decided February 2, 1970. A copy of the Ehlert opinion appears as Appendix "B" herein. The Ehlert opinion holds that once an induction order issues to a registrant, the registrant is foreclosed from having his classification reopened by his local board on the ground that his conscientious objection to war crystallized after the induction order.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 32 C.F.R., §1625.2.

In relevant part Selective Service Regulation, 32 C.F.R., §1625.2, provides that a local draft board may not re-open a registrant's classification after the board has mailed to the registrant an Order to Report for Induction "unless the local board first specifically finds that there has been a change in the registrant's

status resulting from circumstances over which the registrant had no control."

The Ninth Circuit has here held that once an induction order has been issued to a registrant, a newly matured conscientious objection to war can never be a change in the registrant's status resulting from circumstances beyond his control. The Ninth Circuit first enunciated this interpretation of 32 C.F.R., §1625.2, in Ehlert v. United States, ___ F.2d ___ (Appendix "B" herein), where the court conceded that whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. The Second and Tenth Circuits hold that such a late-maturing conscientious objection can constitute such a circumstance. United States v. Gearey, 368 F.2d 144 (2nd Cir. 1966), cert. denied 389 U.S. 959 (1967); United States v. Sandbank, 403 F.2d 38 (2nd Cir. 1968) (dictum), cert. denied 394 U.S. 961 (1969); United States v. Stafford, 389 F.2d 215 (2nd Cir. 1968); Keene v. United States, 266 F.2d 378 (10th Cir. 1959); Martinez v. United States, 384 F.2d 50 (10th Cir. 1967) (dictum), cert. denied 390 U.S. 1016 (1968); United States v. Maine, 417 F.2d 951 (10th Cir. 1969) (dictum). The Fourth, Fifth, Sixth and Seventh Circuits hold to the contrary. United States v. Al-Majied Muhammad, 364 F.2d 223 (4th Cir. 1966); United States v. Helm, 386 F.2d 434 (4th Cir. 1967), cert. denied 390 U.S. 958 (1968); Davis v. United States, 374 F.2d 1 (5th Cir. 1967); United States v. Jennison, 402 F.2d

51 (6th Cir. 1968) (dictum), cert. denied 394 U.S. 912 (1969); United States v. Taylor, 351 F.2d 228 (6th Cir. 1965); United States v. Mulloy, 412 F.2d 421 (6th Cir. 1969), cert. granted on related issue, Oct., 1969, No. 655; United States v. Schoebel, 201 F.2d 31 (7th Cir. 1953); Porter v. United States, 334 F.2d 792 (7th Cir. 1964). 1/

By a split decision in Ehlert, the Ninth Circuit has now adopted the position of the latter circuits. In so doing, the majority of the Ninth Circuit rejected the position taken by the Second Circuit in United States v. Gearey, 368 F.2d 144 (1966), that "The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments." (368 F.2d at 150) The most that the majority of the Ninth Circuit could say in Ehlert is that "Section 1625.2 ... was enacted for the specific purpose of putting an end to the function of the Selective Service

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1/ The First, Third and Eighth Circuits of the Courts of Appeals have not passed on the question. Reported decisions of the District Courts in those Circuits adopt the Gearey (2nd Circuit) rule. See, United States v. Blaisdell, 294 F. Supp. 1303 (D. Me. 1968); United States v. Hinch, 292 F. Supp. 696 (W.D. Wo. 1968); United States v. Skinner, Cr. No. 6862, 1 Sel. Serv. L.R. 3042 (D.N.H. 1968); United States v. Underwood, 151 F. Supp. 874 (E.D. Pa. 1955); United States v. Brown, 129 F. Supp. 237 (D.N.J. 1955).

System . . . [and] requiring a person troubled with conscientious objection to state his claim before receipt of the notice to report is extremely practicable." The court failed to give effect to the nature and character of conscience, thereby made a decision in apparent conflict not only with those circuits which have recognized conscience as an uncontrollable circumstance, but with legislation creating the exemption from military service for conscientious objectors (50 U.S.C. App., §456(j)). The decision of the Ninth Circuit appears also to be contrary to the regulations of some state Selective Service headquarters, which require a local board to re-open a registrant's classification even upon a post-induction order claim of conscientious objection. 2/

2/ See, State Headquarters, Selective Service System, Raleigh, North Carolina, Circular Letter No. III-4-a:

> "I. PROCESSING CONSCIENTIOUS OBJECTOR CLAIMANTS.
>
> * * * * * *
>
> "II. Whenever a registrant files his initial claim as a conscientious objector, the local board is requested to re-open his case under the provisions of SSR 1625.3(a) in order to give the registrant the right of personal appearance and appeal. The registrant's case should be re-opened even though he filed his initial claim after he is under an order to report for induction."

These conflicts directly put in issue in this case by the court below, justify the grant of certiorari to review the judgment below.

II

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING POST-INDUCTION ORDER CLAIMS OF CONSCIENTIOUS OBJECTION TO WAR.

The Ninth Circuit's opinion in this case reflects important statutory and policy considerations governing the assertion of claims of conscientious objection made subsequent to the mailing of an Order to Report for Induction. This Court has not addressed itself to problems arising out of the relationship between 50 U. S. C. App., §456(j) and 32 C. F. R., §1625. 2, and there are compelling reasons why some definitive guidelines should now be marked by this Court. The Selective Service System regularly deals with problems arising out of post-induction order conscientious objector claims and registrants and local boards need the assistance of this Court in understanding the applicability of §1625. 2 to post-induction order claims of conscientious objection, and in assuring uniform operation of the System.

The threshold question is whether §1625.2 has any application to claims of conscientious objection made prior to induction into the armed forces. The statutory exemption for conscientious objectors, 50 U.S.C. App., §456(j) places no "notice of induction" limitation upon the rights to claim conscientious objector status. Unlike the statutes relating to, e.g., student deferments (50 U.S.C. App., §456(h)(1)) and occupational deferments (50 U.S.C. App., §456(h)(2)), which authorize the President to promulgate rules and regulations providing for deferment in those categories, the congressional grant of an exemption for conscientious objection authorizes the President to make only such regulations as pertain to those registrants who have already been found to be conscientiously opposed to participation in the armed forces. A registrant who is a conscientious objector is not subject to service in the armed forces notwithstanding any other sections of the Military Selective Service Act of 1967, including the section giving the President general powers to promulgate rules and regulations. (50 U.S.C. App., §460(b)(1).

It has been suggested that "Regulation 1625.2 cannot foreclose consideration of a claim of conscientious objection whenever made because of the clear statutory language in 50 U.S.C. App., §456(j) that no person conscientiously opposed to participation in war shall be subject to combatant training for service. If the statute is literally construed, the regulation cannot stand unless it is interpreted not to apply to claims of conscientious objections."

United States v. Jennison, 402 F. 2d 51, 56 (6th Cir. 1968) (McCree, J. dissenting). The same question has been raised in the Ninth Circuit by the dissenting opinion of Justice Merrill in the Ehlert case.

Within the Selective Service System itself, the State of North Carolina appears to give full effect to 50 U.S.C. App., §456(j) and directs local draft boards to re-open a registrant's classification in every case in which a conscientious objector claim is made prior to induction. If the statute precludes application of the 1625.2 limitation to conscientious objector claims, the decision below is without any basis in law. Whether the statute permits any other interpretation is a substantial unanswered question fundamental to the uniform function of the Selective Service System.

Assuming that 1625.2 as applied to post-induction claims of conscientious objection was authorized by Congress and is not in conflict with the statutory exemption, the opinion below raises several other unanswered questions:

1. Is crystallization of conscientious objection a "circumstance" under the regulation? The Ninth Circuit has erroneously concluded that because conscientious objection is a state of mind, it can never be a "circumstance" in the sense that an objective physical condition can be. This overlooks the fact that conscientious objector status is always a matter of an intangible condition. Given full effect, the decision of the court below could negate the

statutory exemption, for conscientious objection could never be measured by objective and tangible facts used to ascertain any other classification as, for example, student or fatherhood status. The immediate and more limited effect of the decision in the Ninth Circuit is to single out conscientious objector as the only status entitled to no post-induction order consideration. Whether such a discriminatory interpretation of the regulation is valid should be determined by this Court.

2. Is crystallization of conscientious objection to war a circumstance within the control of the registrant? The court below has negated the most fundamental characteristic of conscience, by holding that it is something which a rational human being controls. Dictates of conscience are matters beyond will and control. One may not depart from the dictates of conscience by rational thinking. A belief subject to the control of the holder is not a claim of conscience. A claim of conscience is something beyond a political opinion or a moral code. A conscientious objection to participation in war is one "to which all else is subordinate or upon which all else is ultimately dependent". United States v. Seeger, 380 U.S. 163, 176 (1965). Such a conscientious objection, by its definition, is not entertained at will. On the contrary, a belief that can be altered at the convenience of the holder is not a conscientious objection within the Seeger definition. "Conscience" and "control" are self-contradictory. The decision below misunderstood the nature of conscience and so created a conflict with the

Seeger decision. This Court should definitively interpret §1625.2 so as to comport with Seeger.

3. To what extent does the interpretation of 1625.2 given to it by the court below affect religious liberty? In the absence of compelling state interests, a law affecting fundamental religious liberties cannot draw distinctions between religious beliefs. Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963). Cf. Skinner v. Oklahoma, 316 U.S. 535 (1942). Such distinctions are condemned by the First Amendment, and are contrary to guarantees of equal protection and due process of the law contained in the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954). An interpretation of 32 C.F.R. 1625.2 precluding all claims of conscience maturing after an order for induction and prior to submission to induction creates an unjustifiable and invidious discrimination and denies concepts of revelation and sudden conversion. (E.g. St. Paul on the Road to Damascus.) The constitution does not permit such a discrimination, and this Court should adopt an interpretation of the regulation consistent with the constitutional mandate.

4. Did Congress intend to create a class of genuine conscientious objectors not entitled to the statutory exemption? The Ninth Circuit rule produces what the Second Circuit has aptly characterized as an "anomalous situation." United States v. Gearey, supra, 368 F.2d at 150, fn. 11. A claim of conscientious

objection advanced prior to the mailing of an induction order may be considered by the local board and such claims advanced after induction, when they have matured after induction, may be considered by the military. Department of Defense Directive No. 1300.6. But the rule adopted by the Ninth Circuit in this case forecloses board review of claims of conscience maturing after the mailing of the induction order and Directive No. 1300.6, by its own terms, forecloses review of claims of conscience that have matured prior to induction. Directive 1300.6, in pertinent part, provides:

> " . . . request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained."

The creation of a "no man's land" for conscience which asserts itself after an induction order but before induction is not required by the language of §1625.2. The unambiguous language of §6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App., §456(j) does not permit a reading of §1625.2 which creates a "no man's land" for claims of conscience which mature "unseasonably":

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." (Emphasis added.) 50 U.S.C. App., §456(j).

Congress, clearly, did not intend to create a class of conscientious objectors who, because their conscience spoke unpropitiously, are excluded from §6(j)'s exemption. Indeed any congressional enactment making such a distinction between claims of conscience would raise serious constitutional questions. Even assuming that exemption for conscientious objectors is a matter of legislative grace not compelled by the First Amendment's free exercise of religion guarantee, nevertheless, government may not arbitrarily and unreasonably grant the exemption privilege to some and deny it to others. Sherbert v. Verner, 374 U.S. 398 (1963). Thus the conscientious objector exemption granted by Congress is subject to the limits of the Constitution. 3/ The Ninth Circuit has

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3/ "We find it unnecessary to determine whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress. . . . For it now seems well-established that legislative power to deny a particular (Cont.)

created a class of conscientious objectors whose claims will never receive consideration. They are both too late (post-induction order) and too early (Department of Defense Directive No. 1300.6). This Court should not permit the anomaly created by the Ninth Circuit rule to stand.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

ALAN SALTZMAN and
MARTHA GOLDIN

Attorneys for Petitioner

3/ Continued:

privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. See Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958). It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination." United States v. Seeger, 326 F. 2d 846, 851 (1964).

APPENDIX "A"

Filed Mar 3 1970
Wm. B. Luck, Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
vs.	)	No. 23, 392
STEPHEN HARVEY MILLANG, Appellant.	)	

Appeal from the United States District Court

Central District of California

BEFORE: BARNES and CARTER, Circuit Judges, and THOMPSON*, District Judge

PER CURIAM:

Millang was convicted for refusal to submit

*The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

to induction into the armed forces, 50 U.S.C. 462. We ordered vacation of the submission of the case on appeal pending the in banc decision of this court in Ehlert v. United States, No. 21,930, decided February 2, 1970. That opinion requires the affirmance of Millang's conviction.

Millang's request for a conscientious objector Form 150, was his first reference to any possible claim of conscientious objection to military service. The request came three days after he had been ordered to report for induction. The board refused to reopen his classification. Later, in a letter, Millang stated that he had made his request for I-O status as soon as his thoughts "became sufficiently crystallized."

Millang's sole claim of error is that the local board should have reopened his classification, after receipt of his induction order, because the crystallization of his views was a change in circumstances beyond his control. Ehlert v. United States, supra, rejected the same contention.

The judgment is Affirmed.

_____

_____

Circuit Judges

_____

District Judge

APPENDIX "B"

United States Court of Appeals
for the Ninth Circuit

William Ward Ehlert, Appellant, vs. United States of America, Appellee.	No. 21,930 IN BANC

[February 2, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, BARNES, HAMLEY, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, CARTER, HUFSTEDLER, WRIGHT, KILKENNY and TRASK, Circuit Judges.

KILKENNY, Circuit Judge:

Appellant, on June 14, 1964, was ordered to report for induction and thereafter sought to reopen his classification in order to establish his status as a conscientious objector. Subsequently, he was convicted of failing to submit to induction into the Armed Forces in violation of 50 U.S.C.App. § 462.

Selective Service Regulations, 32 C.F.R. § 1625.2, in pertinent part, provide:

> "The classification of a registrant shall not be reopened after the local board has mailed to such

> registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

In refusing to reopen his classification, the local board advised appellant that its action was based upon its determination that "the information submitted on SSS form 150 was not a change in your status which was beyond your control."

The District Court, in denying motion for acquittal, ruled as a matter of law that changes in status involving conscientious objection were not beyond the control of the registrant. That ruling is here asserted as error.

Whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side, among others, are *United States v. Sandbank,* 403 F.2d 38 (2d Cir. 1968), *cert denied* 394 U.S. 961 (1969); *United States v. Gearey,* 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1967), *rehearing denied* 389 U.S. 1010 (1967), and *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959). Upon the negative side, among others, are *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953), with approving dicta in *Davis v. United States,* 374 F.2d 1 (5th Cir. 1967); *United States v. Jennison,* 402 F.2d 51 (6th Cir. 1968), *cert. denied* 394 U.S. 912 (1969); *United States v. Helm,* 386 F.2d 434 (4th Cir. 1967), *cert.*

denied 390 U.S. 958 (1968), and *United States v. Al-Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966).

This court has never definitively ruled upon the question. In two cases relied upon by the District Court, language suggests our alignment with *Schoebel. Parrott v. United States,* 370 F.2d 388 (9th Cir. 1966); *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959). In *Dugdale v. United States,* 389 F.2d 482 (9th Cir. 1968), the difference between *Gearey* and the language in *Boyd* and *Parrott* was noted and the choice of rule was expressly reserved. *Briggs v. United States,* 397 F.2d 370 (9th Cir. 1968) and *Oshatz v. United States,* 404 F.2d 9 (9th Cir. 1968) also distinguish *Gearey.* At first glance, *Boswell v. United States,* 390 F.2d 181 (9th Cir. 1968), would seem to support appellant's views. While some of the language there employed points in that direction, a close analysis reveals that the precise point here presented was not there in issue. To the extent, if any, that *Boswell* may be in conflict with our views herein expressed, it is overruled.

The statutory authorization for C.F.R. § 1625.2 is found in 50 U.S.C.App. § 460, which provides, among other things, that the President may "prescribe the necessary rules and regulations to carry out the provisions of this title." All of the authorities agree that the regulation is within the perimeter of the grant of power. Moreover, it is conceded that registrants, eligible for the draft, should not be permitted, without limitation, to challenge their status. Without such a regulation, the manpower quotas of Selective Serv-

ice could not be met with any degree of certainty. An orderly administration of the Selective Service System requires such a regulation. Appellant does not really challenge the reasonableness of the regulation, nor its application to one whose conscientious objection matures prior to the notice to report. He urges that his views on the subject "crystallized" after he received the notice, and that we should follow the lead of *Sandbank, Gearey, Keene* and other similar cases.

Presumptively, every human is a rational being, having a free will and in complete charge of his own thinking. Section 1625.2, with one exception, was enacted for the specific purpose of putting to an end the function of the Selective Service System once a registrant had received his notice to report. The mentioned exception being those cases where the registrant is in a position to furnish the Board with objective evidence entitling him, *prima facie,* to a change of status by reason of circumstances beyond his control. True enough, the regulation does create a brief period during which a registrant is not eligible to present a claim of conscientious objection. This result, in our opinion, does not invalidate the regulation. The logic behind requiring a person troubled with conscientious objection to state his claim before receipt of the notice to report is extremely practicable. A Board can readily ascertain the validity of an "extreme hardship",[1] "sole surviving son",[2] and

[1] 32 C.F.R. § 1622.30(b).
[2] 32 C.F.R. § 1622.40(a)(10).

other such claims and can dispose of them, without difficulty, one way or the other, prior to the reporting date. The exact opposite is true of a claim of exemption based on conscientious objection. An adjudication on the sincerity of a registrant's conscientious objection requires an exploration in depth into his past and present family, religious and vocational life. After such an adjudication, if we followed *Gearey* and similar authorities, it would then be necessary to make the additional adjudication on when there was a crystallization or maturing of the registrant's views. No such procedure is contemplated by the regulation under scrutiny.

We conclude that a crystallization of, or a change in, a registrant's views on conscientious objection is not a change in his status resulting from circumstances over which he has no control, within the meaning of 32 C.F.R. § 1625.2. The judgment of the lower court is AFFIRMED.

CHAMBERS, Chief Judge, BARNES, CARTER, WRIGHT and TRASK, Circuit Judges, Concurring.

DUNIWAY, Circuit Judge:

I concur. I do not think that the claimed "crystalization" of conscientious objection can be said to be "a change in . . . status *resulting from circumstances* over which the registrant has no control." (Emphasis added.) The word "circumstances" indicates to me some fact, act or event external to the mind or consciousness of the registrant, rather than the mysterious and unfathomable internal mental and spiritual

processes of the registrant himself. Whether those processes are beyond the registrant's control I leave to the philosophers among us. I think that, whatever the answer to that question may be, they are not *circumstances* beyond his control.

Dictionary definitions tend to confirm this view. *Funk & Wagnall's New Standard Dictionary* defines "circumstances" as "1. Something existing or occurring incidental to *some other act or event;* a *related or concomitant act or thing.*" (Emphasis added.) *Webster's New International Dictionary,* 2d ed., defines the word as "1. One of the *conditions under which an act or event takes place* or with respect to which a fact is determined; a *condition, fact or event accompanying, or determining* the occurrence of *another fact or event.*" (Emphasis added.)

The practical considerations mentioned by my brother Kilkenny strongly reenforce these views. The regulation should be construed in a manner consistent with those considerations.

Judges Barnes, Ely and Carter concur in the foregoing concurring opinion.

ELY, Circuit Judge (Concurring):

I concur in the majority opinion, and I also endorse the logical analysis expressed by my Brother Duniway. At the same time, I believe that additional factors should be recorded.

We took this case *en banc* for the purpose of considering and resolving the one important problem which the principal opinion attacks, and I am glad

that our court has now supplied desired guidance on that issue. My examination of the record convinces me, however, that insofar as this particular appeal is concerned, we may have indulged ourselves in a great deal of unnecessary intellectual exercise. The contents of Ehlert's Selective Service file lead me to believe that there was no alternative to the affirmance of Ehlert's conviction even had the majority adopted the position taken by my Brother Merrill.

The sole question before the District Court was whether Ehlert's local board erred in refusing to reopen Ehlert's classification. Under the applicable Regulation (32 C.F.R. § 1625.2), all recognize that the board was disempowered to reopen the classification without expressly finding that there was a change in Ehlert's status resulting from circumstances over which he had no control. In determining whether or not it could make that finding, the board could, of course, look only to that which Ehlert himself submitted in support of his belated claim for conscientious objector status.[1] Even in cases not involving an alleged change in status after receipt of the induction notice, the registrant must "clearly establish" his right to an exemption or deferred status. *Petrie v. United States,* 407 F.2d 269 (9th Cir. 1969); *Badger v. United States,* 322 F.2d 902, 906 (9th Cir. 1963).

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[1]This was conceded in the District Court. The trial judge recognized that there was no triable issue of fact and that his scope of review was confined to the determination of whether the contents of Ehlert's Selective Service file disclosed the absence of any basis in fact for the board's refusal to reopen the classification. In this connection, Judge Zirpoli commented that "the very maximum you can go by is whatever was before the Board."

Ehlert set forth his representations, after he received his notice to report for induction, in the standard Selective Service Form SSS 150. As I interpret those representations, none of them supplied the barest basis, even vestigial, upon which the local board could have supported a finding either that Ehlert claimed to be opposed conscientiously to war in any form or that his alleged beliefs crystalized after his receipt of his notice to report for induction. The board would be required to make the determination whether Ehlert's representations would support the required finding, and we must presume the regularity of the board's proceedings. *Oestereich v. Selective Service Local Bd. No. 11,* 393 U.S. 233, 241, 21 L. Ed. 2d 402, 89 Sup. Ct. 414 (1968) (Harlan, J., concurring); *Bishop v. United States,* 412 F.2d 1064, 1067 (9th Cir. 1969).

The threshold question of whether Ehlert claimed to be opposed conscientiously to war in any form focuses our attention on his statements that "I believe that service in the armed forces of *this country at this time* is work toward the end of the destruction of the human race," and "the sole purpose of military service in *this country today* is preparation for a nuclear orgasm which would be totally destructive of human life and values." (Emphasis supplied.) He also stated that he did not believe in a Supreme Being, and that he had no "religious" convictions. Furthermore, he did not claim to be driven by any moral or philosophical code that could be equated with "religion" within the meaning of *United States v.*

Seeger, 380 U.S. 163, 13 L. Ed. 2d 833, 85 Sup. Ct. 850 (1965).

In addition to his failure to state a prima facie claim of conscientious objection, Ehlert also failed to present any facts that would have justified a finding that he had undergone a "change in status," i.e., he did not present a claim that his beliefs had crystalized after receipt of his induction notice. In answer to the inquiry as to "when . . . you received the training and acquired the belief which is the basis of your claim . . .," Ehlert replied, "The time period is from September, 1960, to the present. The source and the method have been the intellectual atmosphere of the University of California and its surroundings and the natural workings of an eager-to-know and questioning mind." In a letter to his local board Ehlert stated that he had been "unable to make a decision of such moment until faced with the absolute necessity to do so. Since the receipt of my induction notice, I have begun to be more fully aware of the implications of military service at this time." This latter statement constitutes the only semblance of a claim that a new belief was reached after the induction notice, and it formed the basis for the argument at trial. District Judge Zirpoli expressed, as one of his then thoughts, the opinion that this language should be interpreted to mean that Ehlert had long been aware of his beliefs but had simply been unable to decide whether to claim the status to which he felt entitled. At least, the board was warranted in interpreting the letter in this fashion and there was abundant basis in fact to sup-

port that interpretation. Judge Zirpoli observed that a basis in fact for this interpretation existed by reason of the long period of the development of Ehlert's attitude coupled with the late filing of the claim. Surely, too, the board was entitled to infer that Ehlert himself believed that he had undergone no change in status. When Ehlert presented his new claim, he wrote, "I realize that I no longer have the legal right to apply for the status of conscientious objector . . . ."

In his footnote 1, my Brother Merrill remarks, "The points raised in Judge Ely's concurring opinion were not reached by the District Court. . . . Before the District Court the appellant asserted that the local board's decision not to reopen was based solely on the ground that his change in status was not beyond his control. The District Court dealt with the case in a manner consistent with this position." I cannot accept this conclusion. The judgment of conviction itself does not, of course, contain specific reasoning or include any explanation by the District Court for the ultimate determination of guilt. During the oral argument of counsel, there were numerous Socratic exchanges in which the learned trial judge clearly indicated his consideration of separate legal approaches. It is true that in the final exchange, the court made a comment which supports a portion of the minority's footnote 1. During the argument, however, the Government's attorney strenuously contended, and I believe correctly, that there was no factual basis upon which the board could have found a change in status. On this, in the extended colloquy,

the District Judge commented, "They [the board] were not obligated to reopen." I think it is obvious, therefore, that the District Court did in fact consider, as it was obligated to consider, the problem to which my comments are directed. It is not unusual for a court, during an analytical exchange, to express thoughts that it may not, in the end, retain; consequently, I believe that we should not cull a judge's off-hand oral comments from the record and employ only some of them in order to conclude definitively that the trial court's ultimate conclusion was based solely upon only a portion of his comments.

The minority also, in its footnote 1, notes "From the record it would appear doubtful that they [the points I discuss] were reached even by the local board." This conclusion flies in the face of the presumption of regularity noted earlier, since the board would be required to make these determinations before it could inform the registrant that it would not reopen or, most certainly, before it could make the required finding that there had been presented a prima facie claim of a change of status resulting from circumstances beyond the registrant's control. Here, the only significant notation made by the board and appearing in the Selective Service file is "Reviewed and not reopened." From this, I cannot agree that there is any doubt whatsoever that the board, performing its duty with regularity, could have blinded itself to the recorded facts which I have specified.

All the above notwithstanding, it seems clear to me that even if we construe the District Court's state-

ments at the conclusion of the argument as a ruling that as a matter of law there could be no change to conscientious objector status after receipt of the induction notice, still we should hold that the District Court was not in a position to reach this question since Ehlert presented no factual basis upon which his board could have justifiably based a finding that he had presented a prima facie claim for a change of status resulting from circumstances beyond his control.[2] From Ehlert's own revelations, the board was thoroughly justified in concluding that his representations as to his beliefs, even if true, would not legally entitle him to conscientious objector status and that such beliefs were not first reached after the notice to report for induction was sent and received. Even, therefore, if we assume, arguendo, that the opposing views[3] of the dissenters are correct, I submit that we would nevertheless be compelled to affirm the judgment of conviction.

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[2]The *Gearey* court itself recognized that late filing could be a factor in determining the sincerity of the claim or the time of crystalization. *United States v. Gearey*, 368 F.2d 144, 150 (2d Cir. 1966).

[3]The dissenters see a "hiatus" created by the fact that a literal construction of Department of Defense Directive No. 1300.6 could support the conclusion that the military will not consider claims arising before actual induction. I believe that the supposed "hiatus" is more fancied than real. I do not read the directive in this way, since the thrust of the directive is toward claims arising before the induction notice. Moreover, I am confident that military authorities would recognize a probable constitutional obligation to consider the genuineness of an inductee's claim that conscientious objector beliefs had become fixed within the brief period between the time of the notice to report for induction and his actual induction into the armed forces.

CHAMBERS, Circuit Judge, concurring:

In my view, the case should be disposed of as Judge Ely would. However, a clear majority of the judges, including the dissenters, thinks the case should be resolved "on the Road to Damascus." On that road, I agree with Judge Kilkenny. Therefore, I concur in Judge Kilkenny's opinion.

MERRILL, Circuit Judge, with whom Circuit Judges HAMLEY, KOELSCH, BROWNING and HUFSTEDLER join, Dissenting:

The majority opinion, affirming the District Court, holds as matter of law that crystallization of a registrant's conscientious objection to war is not, under 32 C.F.R. § 1625.2, "a change in [his] status resulting from circumstances over which [he] had no control."[1] In this posture of the case we must assume that appellant in fact enjoys the status of a conscientious objector but is precluded from recognition of that status by virtue of the provisions of the regulation. Two distinct contentions were advanced by appellee in support of the District Court. The majority opinion appears to rely on both.

1. First it was contended that crystallization of conscientious objection is not a "circumstance" under the regulation; that by "circumstances" the regulation

[1]The points raised in Judge Ely's concurring opinion were not reached by the District Court. From the record it would appear doubtful that they were reached even by the local board. Before the District Court the appellant asserted that the local board's decision not to reopen was based solely on the ground that his change in status was not beyond his control. The District Court dealt with the case in a manner consistent with this position.

was intended to include only such objectively ascertainable conditions as a change in dependency status or physical condition; that it was not meant to include such intangible considerations as state of mind. For two reasons I find this contention unacceptable: (a) I do not believe the regulation is rationally subject to such a construction; (b) so construed, I would hold the regulation to be contrary to statute and invalid.

(a) A "change in the registrant's status" under the regulation can have reference only to a change in the registrant's right to a particular classification. "Circumstances" in this context can have reference only to the conditions relevant to such a change of status. In the case of the conscientious objector status the only relevant condition or circumstance is the registrant's state of mind. The effect of the majority's construction is to single out conscientious objector as one status entitled to no consideration at this stage of the proceedings. I cannot attribute to the regulation such a discriminatory result.

Further this construction would seem to create an anomalous situation noted in *United States v. Gearey*, 368 F.2d 144 (2d Cir. 1966); *cert. denied*, 389 U.S. 959 (1967).[2]

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[2]Footnote 11, 368 F.2d at page 150, states:

"Any other conclusion would result in the anomalous situation that individuals whose claim of conscientious objection mature either prior to receipt of a notice of induction or after induction itself, would be permitted to apply for deferment, while those whose beliefs formed during the interim period, would not be able to properly raise their claims. It would appear this is so because Department of Defense Directive No. 1300.6 states:

Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed

The Congressional policy against requiring combatant training and service of those conscientiously opposed to participation in war is one of long standing. See *Seeger v. United States*, 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty. The armed forces quite appropriately focus their attention on conscientious objection crystallizing after induction, leaving cases of earlier crystallization to the jurisdiction of the Selective Service System.

The majority's construction thus creates a hiatus: Those who become conscientious objectors after notice of induction but before actually being inducted would appear to be excluded from application of the Congressional policy. Application of the policy is made to depend not on one's true status but on when one acquired it.

(b) Legislation creating this exemption from military service, 50 U.S.C.App. § 456(j) provides for no such limitation. The enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It acts upon the substance of the status itself,

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prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained."

and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to entertain timely claims of status on the part of registrants not yet inducted into military service.

2. It was next contended that this "circumstance" (crystallization of conscientious belief), accepting it as such, cannot be said to be one over which the registrant has no control. In other words, assuming appellant to be a true conscientious objector, it was within his control not to become one.

This strikes me as a disparagement of the concept of conscience most out of tune with the prevailing mores of the day. One simply cannot order his conscience to be still or make himself believe what he does not believe and I must reject the implication that it is right and proper that one should suffer loss of status for having failed to bring his conscience to heel.

Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained.

The issue for the board after notice of induction is, then, no different from that presented by an earlier claim: Is the avowed belief conscientiously

entertained?[3] Only the procedure of its resolution differs. But this factual issue should be faced and not be disposed of as a matter of law on such an assumption as is here advanced.

I would reverse.

[3]The further issue is presented: Did the belief in fact crystallize after receiving notice of induction and thus constitute a *change* in status? *Dugdale v. United States*, 389 F.2d 482 (9th Cir. 1968).